017

IN THE SUPREME COURT OF FLORIDA

CASE NO. 76,184

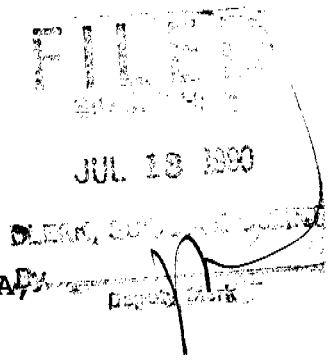
ANTONIO PEREZ,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.



ON PETITION FOR DISCRETIONARY REVIEW

BRIEF OF RESPONDENT ON JURISDICTION

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

MICHAEL J. NEIMAND
Florida Bar #0239437
Assistant Attorney General
Department of Legal Affairs
Florida Regional Service Center
401 N.W. 2nd Avenue, Suite N-921
Miami, Florida 33128
(305) 377-5441

TABLE OF CONTENTS

TABLE OF CITATIONS

CASES — PAGE

INTRODUCTION

The Petitioner, Antonio Perez, was the Appellant below. The Respondent, the State of Florida was the Appellee below. The parties will be referred to as they stand before this Court. The symbol "A" will designate the Appendix to this brief.

STATEMENT OF THE CASE AND FACTS

The Respondent accepts the Petitioner's Statement of the Case and Facts as a substantially accurate account of the proceedings below.

QUESTION PRESENTED

WHETHER THE DECISION IN THE INSTANT CASE EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION IN SPANN V. STATE, 529 SO.2D 825 (FLA. 4TH DCA 1988).

SUMMARY OF THE ARGUMENT

Although the Third District expressly and directly certified that the instant decision conflicts with Spann v. State, 529 So.2d 825 (Fla. 4th DCA 1988), however, the Court need not accept jurisdiction and by so refusing will repudiate Spann and reaffirm the validity of State v. Oliver, 368 So.2d 1331 (Fla. 3d DCA 1979) cert. dismissed, 383 So.2d 1200 (Fla. 1980).

ARGUMENT

THE DECISION IN THE INSTANT CASE EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION IN SPANN V. STATE, 529 SO.2D 825 (FLA. 4TH DCA 1988).

In the instant case the Third District, reaffirming its previous holding in State v. Oliver, 368 So.2d 1331 (Fla. 3d DCA 1979) cert. dismissed, 383 So.2d 1200 (Fla. 1980) held that a voluntary abandonment of contraband after a prior illegal police stop is not made involuntary by way of said illegality. (A. 3). In so holding, the Third District certified conflict with Spann v. State, 529 So.2d 825 (Fla. 4th DCA 1988).

Although conflict between decisions is clear, this Court need not exercise its jurisdiction. By not accepting jurisdiction this Court will, by implication, repudiate Spann and reaffirm the validity of Oliver. (A. 7-12). Since the rational of the Third District's opinion in Oliver is the constitutionally correct one, this Court should abstain from accepting jurisdiction of this case.

CONCLUSION

Based on the foregoing, Respondent submits that this Court should not exercise its jurisdiction in the instant case.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General

MICHAEL J. NEIMAND
Florida Bar #0239437
Assistant Attorney General
Department of Legal Affairs
401 N. W. 2nd Avenue, Suite N921
Miami, Florida 33128
(305) 377-5441

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF RESPONDENT ON JURISDICTION was furnished by mail to HOWARD K. BLUMBERG, Office of the Public Defender, 1351 N.W. 12th Street, Miami, Florida 33125 on this 11 day of July, 1990.

MICHAEL J. NEIMAND

/bf

IN THE SUPREME COURT OF FLORIDA

CASE NO. 76,184

ANTONIO PEREZ,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

APPENDIX TO BRIEF OF RESPONDENT ON JURISDICTION

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

MICHAEL J. NEIMAND
Florida Bar #0239437
Assistant Attorney General
Department of Legal Affairs
Florida Regional Service Center
401 N.W. 2nd Avenue, Suite N-921
Miami, Florida 33128
(305) 377-5441

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JANUARY TERM, A.D. 1990

THE STATE OF FLORIDA,	**	
Appellant,	**	
vs.	**	CASE NO. 89-2024
ANTONIO PEREZ,	**	
Appellee.	**	

Opinion filed May 15, 1990.

An Appeal from a non-final order from the Circuit Court for Dade County, Gisela Cardonne, Judge.

Robert A. Butterworth, Attorney General, and Joan L. Greenberg, Assistant Attorney General, for appellant.

Bennett H. Brummer, Public Defender, and Howard K. Blumberg, Assistant Public Defender, for appellee.

Before HUBBART, COPE and LEVY, JJ.

COPE, Judge.

The State appeals an order suppressing a handgun seized by the police. We reverse.

Two uniformed City of Miami police officers were on patrol in an area known to be high in narcotics activity. They observed

Perez and another male, who appeared to be passing an object between them. Believing that the two might be engaging in a narcotics transaction, one officer exited the police car and started to walk toward Perez. He either told Perez to freeze, or to stop. Perez fled on foot and the officer chased him. Perez ran into an alley while pulling something from his waistband. The officer heard a loud, metallic noise of something dropping in the alley. The officer caught Perez who, after being given Miranda warnings,[1] volunteered that he became nervous and ran "because he knew the gun that he had was stolen." A revolver was recovered in the alley. Perez was charged with carrying a concealed firearm and carrying a concealed firearm by a convicted felon. See §§ 790.01, 790.23, Fla. Stat. (1987).

Perez moved to suppress the firearm and the statement he made to the officers. The trial court concluded, and the State concedes, that the police officers did not have a founded suspicion which would support an investigative stop of the defendant under section 901.151, Florida Statutes (1987). The court granted the motion to suppress on the authority of Monahan v. State, 390 So.2d 756 (Fla. 3d DCA 1980), review denied, 399 So.2d 1146 (Fla. 1981), and Spann v. State, 529 So.2d 825 (Fla. 4th DCA 1988), reasoning that the abandonment of the firearm in the alleyway was a product of the officers' effort to make an illegal stop.

---

[1] Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

The present case is controlled by State v. Oliver, 368 So.2d 1331 (Fla. 3d DCA 1979), cert. dismissed, 383 So.2d 1200 (Fla. 1980). There, the court stated:

> Admittedly, the cases here are in some conflict, but the weight of authority is that a person's otherwise voluntary abandonment of property cannot be tainted or made involuntary by a prior illegal police stop of such person. . . . Only when the police begin to conduct an illegal search can a subsequent abandonment of property be held involuntary as being tainted by the prior illegal search . . . and even that result may vary depending on the facts of the case."

Id. at 1335-36 (citations omitted). Since the present case involved an illegal stop, not an illegal search, the police were entitled to seize the revolver as abandoned property and the motion to suppress it should have been denied.

The trial court's reliance on Monahan v. State is misplaced. In Monahan the police officers were involved in an illegal search, having already examined one of Monahan's two pieces of luggage. Upon being informed that the officers intended to search a second piece of luggage, Monahan disclaimed that he owned it. Our court held that in those circumstances the suitcase could not be deemed abandoned property. 390 So.2d at 757. Monahan did not cite or discuss Oliver, but one of the two cases cited in Monahan, Earnest v. State, 293 So.2d 111 (Fla. 1st DCA 1974), is treated in Oliver as one of the group of cases holding that an abandonment of property is involuntary where it is tainted by a prior illegal search.

Perez argues that Monahan is irreconcilably in conflict with Oliver. There is dictum in Monahan which can be so read, for the opinion states, in part, "Evidence seized as a result of such illegal arrest should have been suppressed." Id. at 757. On its

facts, however, Monahan involved an illegal search and is consistent with the analysis set forth in Oliver. We harmonize the two cases by treating Monahan as a decision involving an abandonment tainted by a prior illegal search, see State v. Oliver, 368 So.2d at 1336, and by treating the quoted passage from Monahan as dictum.

The other authority relied on by the trial court was the fourth district's opinion in Spann v. State. That decision is factually similar to the present case. We certify that our decision is in conflict therewith.

We reverse that part of the trial court's order which suppressed the firearm and remand for further proceedings consistent herewith.[2]

---

[2] The State has not appealed that part of the trial court's order which suppressed the defendant's post-Miranda statement.

PER CURIAM.

Affirmed. *See Hospital Mortgage Group v. First Prudential Dev. Corp.*, 411 So.2d 181 (Fla.1982); *Leitman v. Boone*, 439 So.2d 318 (Fla. 3d DCA 1983).

Cedric SPANN, Appellant,

v.

STATE of Florida, Appellee.

No. 87-0512.

District Court of Appeal of Florida, Fourth District.

Aug. 17, 1988.

Defendant was convicted of drug possession before the Circuit Court, Indian River County, Charles E. Smith, J., and defendant appealed. The District Court of Appeal held that: (1) police officer lacked reasonable articulable suspicion for investigatory stop, and (2) defendant did not abandon aluminum package dropped at police officer's directive sufficient to allow warrantless search.

Reversed.

1. Arrest ⇐63.5(5)

Police officer's observation of black person in company of two white persons after having left restaurant in which drugs were known to be sold, without watching any conversation or transaction, was insufficient to give rise to a reasonable suspicion that crime was being committed and allow an investigative stop. West's F.S.A. § 901.151.

2. Drugs and Narcotics ⇐185.10

Narcotics defendant did not abandon aluminum package dropped at his feet upon police officer's direction to "freeze," sufficient to allow warrantless search of package, where police officer lacked reasonable suspicion for the initial stop and directive. West's F.S.A. § 901.151; U.S.C.A. Const. Amend. 4.

Richard L. Jorandby, Public Defender, and Tanja Ostapoff, Asst. Public Defender, West Palm Beach, for appellant.

Robert A. Butterworth, Atty. Gen., Tallahassee, and Amy Lynn Diem, Asst. Atty. Gen., West Palm Beach, for appellee.

PER CURIAM.

In this drug possession case, while surveilling a particular area, the police noticed a vehicle with a white female driver, and a white male front seat passenger, and appellant, a black back seat passenger, stop near the intersection of 27th Avenue and North Gifford Road in a black neighborhood. The car pulled off the pavement onto the shoulder and the car lights were turned off. Appellant got out of the car, walked down the street, and entered a nearby restaurant. In a few minutes he returned to the car; whereupon, the white male exited the car and, as the police approached, they ordered appellant to "freeze, stop." Appellant stopped and then dropped an aluminum package near his feet; the officers then told him to put his hands on the hood of the car. The police picked up the package and recognized it as cocaine. They then searched appellant and found a bag of marijuana in his rear pocket. Appellant was thereupon arrested for possession of cocaine and marijuana.

[1] At a motion to suppress hearing an officer testified that he had seen other whites using black people to make drug purchases for them so that they would not get "ripped off." The officer believed that is what was going down here because of the mix of people in the car, the black man going into the restaurant where drugs were known to be sold, and his returning to the vehicle. No exchange or transaction was observed by the officer.

[2] We hold the observations made by the officer, even in the light of his experience and knowledge, were insufficient to

A-5

constitute a founded suspicion that appellant had committed, was committing, or was about to commit a crime justifying a stop under section 901.151, Florida Statutes. Furthermore, based upon the stipulation of the parties filed in this cause that the defendant dropped the cocaine packet as a result of the order of the law enforcement officer to stop, we hold that the state's abandonment theory is not persuasive.

Accordingly, the judgment and sentence appealed from are reversed.

DOWNEY, GUNTHER, JJ., and VITALE, LINDA L., Associate Judge, concur.

STATE of Florida, Appellant,

v.

MONTCO RESEARCH PRODUCTS, INC., etc., et al., Appellees.

No. 87-1936.

District Court of Appeal of Florida, Fifth District.

Aug. 18, 1988.

State appealed from an order of the Circuit Court, Putnam County, E.L. Eastmoore, J., dismissing amended information which had charged corporation with violating certain environmental and pollution control statutes. The District Court of Appeal, Orfinger, J., held that statutes did not require allegation or proof of actual harm.

Reversed and remanded.

Health and Environment ⇐25.5(5.5), 25.7(24), 27

Statutes prohibiting knowing transportation of hazardous waste to facility which does not have current and valid permit as required by law, willful or malicious defiling or corruption of water source, and creating, keeping or maintaining a nuisance injurious to health do not require allegation or proof of actual harm. West's F.S.A. §§ 386.041, 387.07, 403.727(1)(b).

Robert A. Butterworth, Atty. Gen., Tallahassee and Sean Daley, Asst. Atty. Gen., Daytona Beach, for appellant.

Linda Logan Bryan of Miller, Shine & Bryan, P.A., St. Augustine, for appellees.

ORFINGER, Judge.

The State appeals the order dismissing the amended information which charged Montco Research Products, Inc. with Count I, disposing, treating or storing hazardous waste without a valid permit;[1] Count II, disposing deleterious substances;[2] Count III, creating, keeping or maintaining a nuisance injurious to health;[3] and Count IV, criminal pollution.[4] In dismissing the amended information the trial court relied on *State v. Hamilton*, 388 So.2d 561 (Fla. 1980) for the proposition that in order to charge a crime under the various pollution statutes it was necessary that the information allege actual harm. We reverse.

State v. Hamilton dealt with the constitutionality of section 403.161(1)(a), Florida Statutes (1977).[5] The State alleged that

1. § 403.727(3)(b), Fla.Stat. (1983).

2. § 387.08, Fla.Stat. (1983).

3. § 386.041, Fla.Stat. (1983).

4. §§ 403.161(1)(a) and (3), Fla.Stat. (1983).

5. This section provides:
It shall be a violation of this Chapter, and it shall be prohibited:
(a) To cause pollution, except as otherwise provided in this Chapter, so as to harm or injure human health or welfare, animal, plant, or aquatic life or property.
Section 403.031(7), Florida Statutes, defines pollution as
[T]he presence in the outdoor atmosphere or waters of the state of any substances, contaminants, noise, or man-made or man-induced alteration of the chemical, physical, biological, or radiological integrity of air or water in

A-6

noted that the Interstate Commerce Commission requires all trip leases to have a clause making the carrier legally responsible to the public for use of a vehicle but held that an indemnity agreement, where owner agrees to indemnify the carrier, is valid and enforceable as a risk allocation device and is not repugnant to the mandatory acceptance of liability clause. *Transamerican Freight Lines, Inc. v. Brada Miller Freight Systems, Inc.*, 423 U.S. 28, 96 S.Ct. 229, 46 L.Ed.2d 169 (1975). The holding establishes that such an indemnity clause does not work to circumvent the requirement in I.C.C. regulations as to lessee-carrier's responsibilities to the public; that it is not prohibited on public policy grounds by the "control and responsibility" requirement of 49 C.F.R. § 1057.3(a); that such a clause does not affect the lessee's basic responsibility to the public, but only the relationship between the lessee and the lessor; that it does not conflict with the safety provisions of the I.C.C.'s regulations, §§ 1057.4(c) and 1057.4(e), relating to vehicle inspections and driver familiarity with safety regulations. Also see, *Gateway Transportation Co. v. Phillips and Phillips Co.*, 261 N.W.2d 175 (Iowa 1978).

[2] We now directly address the issue of which insurer must provide primary coverage. As stated in *Burton v. Diamond Sand and Stone Company*, 327 So.2d 95 (Fla. 2d DCA 1976) the employment status of the driver of the leased equipment is of paramount importance and this question must be answered in order to determine primary coverage. In the instant case the trial court did make the specific determination that the tractor-trailer driver was the exclusive employee of the lessor, Calhoun, under the express terms of the lease agreement which states in pertinent part:

"Contractor [Calhoun] shall furnish the drivers named on the reverse side hereof and shall be responsible for and pay drivers' salaries, any applicable union benefits, Workmen's Compensation coverage, all taxes based on payroll and all other costs and expenses incident to drivers' employment. The drivers shall at no time be employees or agents of Carrier [Altruk]. Contractor shall provide Carrier with true copies of the Interstate Commerce Commission physical examination of the drivers, or doctor's certificates in lieu thereof, and drivers' daily logs for the seven days prior to the day of the execution of this Trip Lease or certificates in lieu thereof."

The Burton court pointed out that under the type of factual situation that we are considering here, there is no doubt that the lessor's insurer is estopped to deny primary coverage based on the doctrine of respondeat superior; the lessee's insurer would then provide secondary coverage. Also see, *Hertz Corporation v. Parsons*, 419 F.2d 783 (5th Cir. 1969).

We find no error in the ruling of the trial court that Empire Fire and Marine Insurance Company is the primary insurer and the coverage afforded by Transport Indemnity Company is excess and shall not apply until the limits of the primary coverage of Empire have been exhausted.

For the above-stated reasons, the judgment is hereby affirmed.

Affirmed.

The STATE of Florida, Appellant,

v.

Timothy OLIVER, Appellee.

No. 78–639.

District Court of Appeal of Florida, Third District.

March 13, 1979.

Rehearing Denied April 18, 1979.

Defendant, charged with unlawful possession of marijuana, moved to suppress the marijuana on unreasonable search and sei-

A-7

zure grounds. The Circuit Court, Dade County, John A. Tanksley, J., granted the motion, and the State appealed. The District Court of Appeal, Hubbart, J., held that although patrolling officers acted improperly in stopping defendant and his brother, who were riding bicycles, based on a bare suspicion that they might have been involved in burglaries in the area, officers' retrieval of paper bag which defendant threw onto street after being ordered to stop did not constitute a search of defendant's person since abandonment of the bag, which was found to contain marijuana, in an area where defendant had no reasonable expectation of privacy was not prompted or tainted by the illegal stop.

Reversed and remanded.

1. Searches and Seizures ⇐1

Police retrieval of evidence discarded in a public street by a defendant after being illegally ordered to stop by the police but before the police have begun a physical search of defendant's person or property does not constitute a "search of defendant's person" within meaning of search and seizure provisions of the State and Federal Constitutions. West's F.S.A.Const. art. 1, § 12; U.S.C.A.Const. Amends. 4, 14.

See publication Words and Phrases for other judicial constructions and definitions.

2. Searches and Seizures ⇐7(1)

Central to invoking constitutional guarantees against unreasonable searches and seizures is a threshold showing that a government officer has seized and searched a person. West's F.S.A.Const. art. 1, § 12; U.S.C.A.Const. Amends. 4, 14.

3. Searches and Seizures ⇐7(1, 10)

Although officers investigating residential burglaries had received reports that some burglaries may have been committed by young black teen-agers on bicycles, the officers, who observed two black teen-agers riding bicycles in vicinity on a pleasant day, who had never seen the pair before and who followed them for a few blocks during which nothing untoward or suspicious occurred, engaged in an unconstitutional seizure when they stopped the pair for temporary questioning; however, paper bag which one youth threw onto the street after being ordered to stop was properly seized since it had been voluntarily abandoned in an area where the youth had no reasonable expectation of privacy and such abandonment was not prompted or tainted by the illegal stop. West's F.S.A.Const. art. 1, § 12; U.S.C.A.Const. Amends. 4, 14; West's F.S.A. §§ 893.03(1)(c), 893.13(1)(e, f).

4. Searches and Seizures ⇐1

A "search and seizure" covers any official invasion of a person's reasonable expectations of privacy as to his person, house, papers or effects. West's F.S.A.Const. art. 1, § 12; U.S.C.A.Const. Amends. 4, 14.

See publication Words and Phrases for other judicial constructions and definitions.

5. Searches and Seizures ⇐1

Searches of the person include any physical touching of an individual's body or clothing that causes hidden objects or matters to be revealed, such as rummaging through one's pockets or clothing, patting down one's outer clothing without going into the pockets or other inner recesses, knocking property loose from an individual by tackling him, extracting an individual's blood by means of a hypodermic needle, or taking scrapings from beneath his fingernails. West's F.S.A.Const. art. 1, § 12; U.S.C.A.Const. Amends. 4, 14.

6. Searches and Seizures ⇐1

Police demand that an individual disclose or hand over a concealed object is treated as a search as is a police demand that individual open drawers and physically move the contents therein from side to side for police viewing. West's F.S.A.Const. art. 1, § 12; U.S.C.A.Const. Amends. 4, 14.

7. Searches and Seizures ⇐7(10)

It is not a search for the police to retrieve property which a defendant has voluntarily abandoned in an area where he has no reasonable expectation of privacy, as where a person discards property in the open fields while being pursued by the po-

A-8

lice or in the public street either prior to an attempted police stop, or after such a stop has been attempted or completed, or in a hotel room or shack which has been vacated; central to such rule is such a seizure does not invade a reasonable expectation of privacy. West's F.S.A.Const. art. 1, § 12; U.S.C.A.Const. Amends. 4, 14.

8. Searches and Seizures ⇐7(10)

A person's otherwise voluntary abandonment of property cannot be tainted or made involuntary by prior illegal police stop; only when the police begin to conduct an illegal search can a subsequent abandonment of property be held involuntary as being tainted by the prior illegal search. West's F.S.A.Const. art. 1, § 12; U.S.C.A. Const. Amends. 4, 14.

9. Searches and Seizures ⇐7(10)

No one can have a reasonable expectation of privacy, which is at the core of Fourth Amendment protection, with respect to property which he has decided to discard in the public streets in hope of avoiding a police search. West's F.S.A.Const. art. 1, § 12; U.S.C.A.Const. Amends. 4, 14.

10. Criminal Law ⇐394.6(5)

It is the function of a trial court, in ruling on a suppression motion, to carefully weigh abandonment testimony against other circumstances in the case and particularly where the police officer involved has a past history of giving remarkably similar testimony in other cases. West's F.S.A. Const. art. 1, § 12; U.S.C.A.Const. Amends. 4, 14.

11. Criminal Law ⇐1158(4)

Although in reviewing a suppression ruling the District Court of Appeal is precluded from reweighing or reevaluating abandonment testimony, it reserves the right, as in any other case, to reject inherently incredible and improbable testimony or evidence. West's F.S.A.Const. art. 1, § 12; U.S.C.A.Const. Amends. 4, 14.

12. Searches and Seizures ⇐7(1)

The abandonment or plain sight doctrine should not be cynically employed by the State as a way around the Fourth Amendment. West's F.S.A.Const. art. 1, § 12; U.S.C.A.Const. Amends. 4, 14.

Janet Reno, State's Atty., and Ira N. Loewy, Asst. State's Atty., for appellant.

Bennett H. Brummer, Public Defender and Bruce A. Rosenthal, Asst. Public Defender, for appellee.

Before HENDRY and HUBBART, JJ., and EZELL, BOYCE F., JR., (Ret.), Associate Judge.

HUBBART, Judge.

This is a criminal prosecution for unlawful possession of marijuana in which the trial court granted the defendant's motion to suppress the subject marijuana on unreasonable search and seizure grounds. The state takes an appeal therefrom, which appeal we have jurisdiction to entertain. § 924.071(1), Fla.Stat. (1977).

[1] The central question presented for review is whether the police retrieval of evidence discarded in the public streets by a defendant (a) after being illegally ordered to stop by the police but (b) before the police have begun a physical search of the defendant's person or property, constitutes a search of the defendant's person within the meaning of the Fourth and Fourteenth Amendments to the United States Constitution and Article I, Section 12 of the Florida Constitution. We hold that such evidence has been voluntarily abandoned by the defendant in an area where he has no reasonable expectation of privacy for the purpose of avoiding a police search and for that reason the police retrieval of such evidence from the public streets does not constitute a search of the defendant's person within the meaning of the above constitutional provisions. Accordingly, we reverse the order under review.

A

The facts surrounding the seizure of the subject marijuana are undisputed. On December 7, 1977, at approximately 11:45 a.m., Officer Michael Liotti and Detective Was-

A-9

serman of the City of Miami Police Department were on patrol in an unmarked police car in the vicinity of Miami Avenue between 65th Street and 70th Street in Miami, Florida. They were investigating residential burglaries in that area and had received reports that some such burglaries may have been committed by young black teenagers on bicycles. The police officers observed the defendant Timothy Oliver and his brother Jerry, both black teenagers, riding bicycles on a pleasant Miami day. The officers had never seen these young men in the area and decided to follow them on the hunch that they might have something to do with the residential burglaries the police were investigating. The officers followed at a safe distance for a few blocks, waited while the pair pulled into a nearby gas station for a soft drink, and then continued to follow them for several more blocks. During the entire time the officers conducted this surveillance, nothing untoward or suspicious occurred other than the two teenagers riding slowly, leisurely looking around the neighborhood.

In the 5600 block of Miami Avenue, the police pulled along side the two teenagers, identified themselves as police officers, and told the two to pull over. Officer Liotti testified that their purpose in doing so was to temporarily detain and question the defendant and his companion concerning the residential burglaries in the area; the officers had no intention of arresting the two young men had they proved cooperative. After being ordered to stop, the defendant and his brother continued riding their bicycles while the defendant was seen to throw a paper bag to the ground on the public street. Detective Wasserman caught up to and detained the defendant and his brother while Officer Liotti retrieved the bag discarded by the defendant. An examination of the bag's contents revealed a substance which appeared to be marijuana. The defendant was thereupon arrested for unlawful possession of marijuana.

The state charged the defendant by information with unlawful possession of more than five grams of marijuana [§§ 893.03(1)(c), 893.13(1)(e), (f), Fla.Stat. (1977)] before the Circuit Court of the Eleventh Judicial Circuit of Florida. The defendant entered a plea of not guilty and filed a pre-trial motion to suppress the subject marijuana on unreasonable search and seizure grounds. The trial court took testimony on the motion wherein the above facts were established and thereafter entered an order granting the defendant's motion to suppress. The state appeals.

B

[2, 3] The Fourth Amendment to the United States Constitution and Article I, Section 12, of the Florida Constitution guarantees to the people, among other things, the right "to be secure in their persons . . . against unreasonable searches and seizures." Central to invoking this constitutional guarantee is a threshold showing that a government officer has seized and searched a person. In the instant case, there is no question that the police seized the defendant's person in the constitutional sense when they ordered the defendant to stop for the purpose of temporary questioning, *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); nor is there any doubt that this seizure was unreasonable as it was based on a bare suspicion. *Mullins v. State*, 366 So.2d 1162 (Fla. 1978). The able trial judge so concluded in the order under review and we are in complete agreement therewith.

The controversy in this case centers on whether the police searched the defendant's person when they retrieved the suspect marijuana from the public streets following the unreasonable seizure of the defendant. Stated another way, the question is whether the defendant voluntarily abandoned the suspect marijuana when he threw it into the public streets after being ordered to stop by the police or whether such abandonment was involuntary as being fatally tainted by the unreasonable police stop. If it is the former, no search of the person has taken place, *Hester v. United States*, 265 U.S. 57, 44 S.Ct. 445, 68 L.Ed. 898 (1924); if it is the latter, such a search has taken

A-10

place under the fruit of the poisonous tree doctrine. *Wong Sun v. United States*, 371 U.S. 471, 488, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963). Our constitutional analysis must necessarily center on resolving this issue.

C

[4] A search in the Fourth Amendment sense has been narrowly defined as "an inspection or examination of places closed from public or general view, and requires some measure of force or intrusion." *State v. Ashby*, 245 So.2d 225, 227 (Fla.1971). More broadly, it has also been held that "the Fourth Amendment governs all intrusions on personal security by agents of the public. If there is an intrusion upon personal security by an officer, there is a search." *Elson v. State*, 337 So.2d 959, 963 (Fla.1976). Essentially, then, a search and seizure under the Fourth Amendment covers any official invasion of a person's reasonable expectation of privacy as to his person, house, papers or effects. *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967); *Huffer v. State*, 344 So.2d 1332 (Fla.2d DCA 1977).

[5, 6] Searches of the person therefore include any physical touching of an individual's body or clothing that causes hidden objects or matters to be revealed, such as rummaging through one's pockets or clothing, *Sibron v. New York*, 392 U.S. 40, 63, 88 S.Ct. 1889, 20 L.Ed.2d 917 (1968); *Beck v. Ohio*, 379 U.S. 89, 85 S.Ct. 223, 13 L.Ed.2d 142 (1964), patting down one's outer clothing without going into the pockets or other inner recesses, *Terry v. Ohio*, 392 U.S. 1, 16, 88 S.Ct. 1868, 20 L.Ed. 889 (1968), knocking property loose from an individual by tackling him, *Ippolito v. State*, 80 So.2d 332 (Fla.1955), extracting an individual's blood by means of a hypodermic needle, *Schmerber v. California*, 384 U.S. 757, 767, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966), or taking scrapings from beneath his fingernails, *Cupp v. Murphy*, 412 U.S. 291, 295, 93 S.Ct. 2000, 36 L.Ed.2d 900 (1973). A police demand that an individual disclose or hand over a concealed object is treated as a search, *Moore v. State*, 181 So.2d 164 (Fla.3d DCA 1965); *United States v. Hallman*, 365 F.2d 289 (3d Cir. 1966); *Kelley v. United States*, 111 U.S.App.D.C. 396, 298 F.2d 310 (1961), as is a police demand that an individual open drawers and physically move the contents therein from side to side for police viewing. *Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969).

[7] It is not a search, however, for the police to retrieve property which a defendant has voluntarily abandoned in an area where he has no reasonable expectation of privacy, *Freyre v. State*, 362 So.2d 989, 991 (Fla.3d DCA 1978), as where a person discards property (a) in the open fields while being pursued by the police, *Hester v. United States*, 265 U.S. 57, 44 S.Ct. 445, 68 L.Ed. 898 (1924), or (b) in the public street either prior to an attempted police stop, *Mitchell v. State*, 60 So.2d 726 (Fla.1952); *Holliday v. State*, 104 So.2d 137 (Fla.1st DCA 1958); *State v. Jackson*, 240 So.2d 88 (Fla.3d DCA 1970), or after such a stop has been attempted or completed, *State v. Nittolo*, 317 So.2d 748 (Fla.1975); *State v. Padilla*, 235 So.2d 309 (Fla.3d DCA 1970), or (c) in a hotel room or shack which has been vacated, *Abel v. United States*, 362 U.S. 217, 80 S.Ct. 683, 4 L.Ed.2d 668 (1960); *Jones v. State*, 332 So.2d 615 (Fla.1976). Central to this line of cases is the court's conclusion that the police seizure of such evidence does not invade a reasonable expectation of privacy belonging to the person in question. In each case, the person has made a voluntary decision to avoid a police search by discarding evidence in an area where he has no Fourth Amendment protection. As a consequence, he cannot later claim that, notwithstanding his conduct, he was the victim of a police search as to the evidence he discarded.

[8] In the instant case, we are concerned with whether the defendant *voluntarily* abandoned the suspect marijuana in view of the prior illegal police stop of the defendant. Admittedly, the cases here are in some conflict, but the weight of authority is that a person's otherwise voluntary abandonment of property cannot be tainted or made involuntary by a prior illegal police

A-11

stop of such person. *Freyre v. State*, 362 So.2d 989 (Fla.3d DCA 1978); *Smith v. State*, 333 So.2d 91 (Fla.1st DCA 1976); *Riley v. State*, 266 So.2d 173 (Fla.4th DCA 1972). Contra: *Stanley v. State*, 327 So.2d 243 (Fla.2d DCA 1976). Only when the police begin to conduct an illegal search can a subsequent abandonment of property be held involuntary as being tainted by the prior illegal search, *Kraemer v. State*, 60 So.2d 615 (Fla.1952); *Earnest v. State*, 293 So.2d 111 (Fla.1st DCA 1974); *State v. Neri*, 290 So.2d 500 (Fla.2d DCA 1974), and even that result may vary depending on the facts of the case. *Freyre v. State*, 362 So.2d 989, 991 (Fla.3d DCA 1978).

[9] Fundamental Fourth Amendment interests as well as sound logic support the prevailing case law in this subject. Until an actual police search has begun, it cannot be assumed that the police will search a person whom they have temporarily stopped on the street or that they will search such a person's car or other personal belongings. Not every temporary detention necessitates such action. *State v. Lundy*, 334 So.2d 671, 673 (Fla.4th DCA 1976). As a consequence, a person's abandonment of property subsequent to an illegal police stop can hardly be considered the product of the stop. In any event, no person can have a reasonable expectation of privacy [which is at the core of Fourth Amendment protection] with respect to property which he has decided to discard in the public streets in hope of avoiding a police search. Such a decision precludes him from later asserting Fourth Amendment protection as to such property.

In the instant case, the defendant discarded property in the public streets after being illegally ordered to stop by the police. This otherwise voluntary abandonment of property in an area where the defendant had no reasonable expectation of privacy was in no sense prompted or tainted by the illegal police stop. Indeed, all agree that the police officers herein intended to stop and briefly question the defendant, rather than to arrest and search him. Moreover, the defendant no longer had any reasonable expectation of privacy in the property which he discarded because he divested himself of all possession therein by dropping it in a place where the public had complete access. This voluntary decision to avoid a police search by abandonment precludes him from now claiming that he was the victim of a search as to the property he discarded. No interest protected by the Fourth Amendment or Article I, Section 12, of the Florida Constitution was invaded when the police retrieved the suspect marijuana from the public streets.

D

[10–12] This decision in no way authorizes open season by the state on people who walk or drive in the public streets. The court is fully cognizant that the state's claim of abandonment like other testimony, can be spuriously as well as credibly asserted at the trial level. It is the function of the trial court to carefully weigh abandonment testimony against the other circumstances in the case, particularly where, unlike this case, the police officer involved has a past history of giving remarkably similar testimony in other cases. Although this court is precluded from re-weighing or re-evaluating abandonment testimony, we do reserve the right, as in any other case, to reject "'inherently incredible and improbable testimony or evidence.'" *Shaw v. Shaw*, 334 So.2d 13, 16 (Fla.1976). The abandonment or plain sight doctrine should never be cynically employed by the state as a way around the Fourth Amendment. In the instant case, our review of the record reveals no such inherently incredible or improbable testimony.

The order under review is reversed and the cause remanded to the trial court for further proceedings.

Reversed and remanded.

A-12